Supreme Court, U.S.
FILED
JUN 20 1996
CLERK

No. 95-1879

In The

Supreme Court of the United States

October Term, 1995

UNITED STATES DEPARTMENT OF AGRICULTURE,

Petitioner,

vs.

CAL-ALMOND, INC., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICI CURIAE* OF ALMOND HULLERS AND PROCESSORS ASSOCIATION, STUART WOOLF, TONY CAMPOS, CAMPOS BROS., KEN CUNNINGHAM, HUGHSON NUT MARKETING, PARAMOUNT FARMS, NED RYAN, RYAN PARREIRA ALMOND COMPANY, PANOCHE CREEK FARMS AND HARRIS WOOLF CALIFORNIA ALMONDS IN SUPPORT OF PETITION

KENDALL L. MANOCK
Counsel of Record
CHARLES K. MANOCK
BAKER, MANOCK & JENSEN
Attorneys for Amici Curiae
5260 North Palm Avenue
Suite 421
Fresno, California 93704-2209
(209) 432-5400

9046
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21
5 PP

Almond Hullers and Processors Association, Stuart Woolf, Tony Campos, Campos Bros. Farms, Ken Cunningham, Hughson Nut Marketing, Paramount Farms, Ned Ryan, Ryan Parreira Almond Company, Panoche Creek Farms and Harris Woolf California Almonds submit this brief as *amici curiae* in support of the petition of the Solicitor General for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

CONSENT BY THE PARTIES

Written consent to file this *amicus* brief has been obtained from all parties to the action. The written consents are lodged herewith.

STATEMENT

This brief is filed on behalf of a wide cross-section of the almond industry which includes individual handlers and the Almond Hullers and Processors Association which comprises approximately 85 percent of all the almond tonnage in California. The *amici* own and operate almond processing facilities and, in many cases, individually farm almond orchards. Most of their operations are relatively small and generally are without adequate resources to mount major national advertising promotional and marketing programs on an individual basis.

The outcome of this case will significantly affect the almond industry of California and directly impact each of the *amici* and their members and owners. All of them operate their businesses subject to the provisions of the Marketing Order for California Almonds, 7 C.F.R. 981.13, *et seq.*, issued by the Secretary of Agriculture under the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601, *et seq.* It authorizes mandatory assessments for advertising, promotions and marketing

programs under the direction of the Secretary of Agriculture on the recommendation of a Board representing growers and handlers appointed by the Secretary.

The validity of the programs for the California almond industry are now in serious question because of the decisions by the Ninth Circuit Court of Appeal in *Cal Almond, Inc. v. USDA*, 14 F.3d 429 (9th Cir. 1993) ("*Cal Almond I*") and *Cal Almond, Inc. v. USDA*, 67 F.3d 874 (9th Cir. 1995) ("*Cal Almond II*") *Cal Almond I* held that the mandatory assessments violated the First Amendment rights of free speech of the complaining handlers and remanded the matter to the District Court to determine the remedy. In *Cal Almond II* the District Court's order refunding the full amount of the assessments paid to the Almond Board since 1980 was affirmed, but the order providing for the reimbursement of payments by the complaining handlers to third parties for their own advertising was reversed. These two decisions have left the almond industry in disarray and the Almond Board uncertain as to what programs it can recommend to the Secretary, what assessments can be proposed for what purpose and what assessments are still subject to challenge by objecting handers.[1] Since all of these decisions are subject to administrative review as provided in 7 U.S.C. § 608(C)(15)(a) they involve lengthy proceedings, first before the Secretary of Agriculture and then through the federal court system. A process which could take many years to resolve.

After *Cal Almond I*, but before *Cal Almond II* became final, the Ninth Circuit decided *Wileman Bros. & Elliott, Inc. v. Espy*, 58 F.3d 1367 (9th Cir. 1995). Relying on *Cal Almond I*, it held that a similar mandatory assessment program for advertising in the tree fruit industry violated the First Amendment. After the

---

1. Both decisions are now subject to certiorari. *Mercer v. Theriot*, 377 U.S. 152 at 153-154, 84 S. Ct. 1157 (1964).

Solicitor General filed his petition for certiorari in *Cal-Almond*, this court granted certiorari in *Wileman. Daniel R. Glickman, Secretary of Agriculture, Petitioner v. Wileman Bros. & Elliott, Inc., et al., Respondents,* (No. 95-1184) __ S. Ct. __, 1996 W.L. 38051 (U.S. III); 64 USLW 3519 (June 3, 1996) ("*Wileman*").

The current status of the *Cal Almond* case poses a dilemma for the *amici*. The almond industry in California is one of over 250 agricultural industries with commodity promotion and research programs operating under federal and state law in the United States. O.D. Forker and R.W. Ward, *Commodity Advertising: The Economics and Measurements of Generic Programs,* 183 Lexington Book (1993). If the *Cal Almond* petition for writ of certiorari is not held as requested by the Solicitor General, the *Cal Almond* case will become final; the Almond Marketing Order will be subject to the First Amendment test and remedy applied by the Ninth Circuit Court of Appeals; and the almond industry alone, among all other commodity groups, will not be subject to this Court's determination of *Wileman*.

CONCLUSION

To prevent the imposition of the First Amendment issues raised in *Cal Almond I* and the remedy issues raised in *Cal-Almond II,* the petition for a writ of certiorari by the Solicitor General in the *Cal Almond* case should be held and disposed of as appropriate in accordance with this Court's decision in *Wileman.*

Respectfully submitted,

KENDALL L. MANOCK
Counsel of Record
CHARLES K. MANOCK
BAKER, MANOCK & JENSEN
Attorneys for Amici Curiae
5260 North Palm Avenue
Suite 421
Fresno, California 93704-2209
(209) 432-5400